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Kenneth L. Jesmore

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Toward the Preservation of Personal Privacy: Chief Justice Wright's Opinions on Search and Seizure and the Right of Privacy

By KENNETH L. JESMORE*

Introduction

When Chief Justice Donald R. Wright joined the California Supreme Court in 1970, it had already adopted the revolutionary legal concept of privacy defined by the United States Supreme Court in *Katz v. United States*.¹ The highest state court had twice held that personal privacy, even while the individual was in an area accessible to the public, may be entitled to constitutional protection from warrantless² searches by the police and that

* B.A., 1963, Michigan State University; J.D., 1966, Wayne State University; member, California and Michigan bars. Senior Attorney, Supreme Court of California.

1. 389 U.S. 347 (1967). In *Katz*, the United States Supreme Court chose to focus on the personal privacy surrounding all persons in both private and public places, rather than on an individual's precise position in relation to a measurable, "constitutionally protected area." *Id.* at 350-52. The Court thus held that the Fourth Amendment protects "people, not places." *Id.* at 351. *Accord*, *Terry v. Ohio*, 392 U.S. 1 (1968). What a person "knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." 389 U.S. at 351-52. These rights of privacy have recently been held to be "implicit in the concept of ordered liberty." *Roe v. Wade*, 410 U.S. 113, 152 (1973). For further discussion of the constitutional right of privacy, see generally S. HUFSTEDLER, *THE DIRECTIONS AND MISDIRECTIONS OF A CONSTITUTIONAL RIGHT OF PRIVACY* (1971); Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 356-58, 382-88 (1974) [hereinafter cited as *Perspectives*]; Weinreb, *Generalities of the Fourth Amendment*, 42 U. CHI. L. REV. 47 (1974) [hereinafter cited as *Generalities*]; Note, *People v. Triggs: A New Concept of Personal Privacy in Search and Seizure Law*, 25 HASTINGS L.J. 575, 578-87 (1974) [hereinafter cited as *Personal Privacy*].

2. Although this commentary will not review the principles underlying the modern construction of the Fourth Amendment to the United States Constitution and article I, section 13, of the California Constitution, a few observations are in order. The Fourth Amendment protects individuals "in their persons, houses, papers, and effects, against unreasonable searches" U.S. CONST. amend. IV. The Fourth Amendment also provides that "no warrants shall issue, but upon probable cause." Because the requirements for a warrantless search "surely cannot be less stringent," *Wong Sun v. United States*, 371 U.S. 471, 479 (1963), probable cause is also required in such circumstances. See *Draper v. United States*, 358 U.S.

evidence obtained by infringement of this right may be subject to exclusion³ at trial.⁴ Following Justice Harlan's concurrence in *Katz*,⁵ the California Supreme Court had ruled in the first of these cases, *People v. Edwards*,⁶ that the constitutionality of police searches and seizures depended upon "whether the person [whose privacy might have been invaded has] exhibited^[7] a reasonable expectation of privacy and, if so, whether that expectation has been violated by unreasonable governmental intrusion."⁸

307 (1959). Warrantless intrusions are justified only when the suspect voluntarily consents or immediate action is necessary to preserve life or to prevent destruction of evidence. *Warden v. Hayden*, 387 U.S. 294 (1967); *United States v. Jeffers*, 342 U.S. 48, 52 (1951); *Guidi v. Superior Court*, 10 Cal. 3d 1, 513 P.2d 908, 109 Cal. Rptr. 684 (1973). See *Perspectives*, *supra* note 1, at 358-60. No intrusion reviewed by Chief Justice Wright and discussed in this commentary was made with a warrant.

3. A major development common to the imposition of constitutional limitations on all aspects of police investigatory techniques is the so-called "exclusionary rule," which provides for the exclusion from a criminal prosecution of evidence obtained in violation of the Constitution. The rule was formally adopted in *Mapp v. Ohio*, 367 U.S. 643 (1961). The ultimate purpose of the rule is to protect the individual from unreasonable governmental intrusion. Despite widespread concern that the United States Supreme Court is slowly dismantling the exclusionary rule, the California Supreme Court continues to reaffirm its adherence to that rule. See, e.g., *People v. Triggs*, 8 Cal. 3d 884, 506 P.2d 232, 106 Cal. Rptr. 408 (1973).

For a review of the exclusionary rule, see *Perspectives*, *supra* note 1, at 409. Professor Amsterdam concluded that the exclusionary rule functions as a general command to government to regulate its behavior when necessary to protect an individual's overriding constitutional rights. *Id.* at 361-73.

4. *People v. Bradley*, 1 Cal. 3d 80, 84-86, 460 P.2d 129, 131-32, 81 Cal. Rptr. 457, 459-60 (1969); *People v. Edwards*, 71 Cal. 2d 1096, 1100-05, 458 P.2d 713, 715-18, 80 Cal. Rptr. 633, 635-38 (1969).

5. 389 U.S. 347, 360 (1967) (Harlan, J., concurring). The *Katz* majority did not use the phrase "reasonable expectation of privacy"; it referred instead to a justifiable reliance on privacy. 389 U.S. at 353. In proposing guidelines for determining whether a person's privacy is entitled to constitutional protection, however, Justice Harlan stated: "[A] person [must] have exhibited an actual (subjective) expectation of privacy [and] that . . . expectation [must] be one that society is prepared to recognize as 'reasonable.'" *Id.* at 361 (Harlan, J., concurring). The Court subsequently derived the following standard from Justice Harlan's concurrence: "wherever an individual may harbor a reasonable 'expectation of privacy,' . . . he is entitled to be free from unreasonable governmental intrusion." *Terry v. Ohio*, 392 U.S. 1, 9 (1968) (citation omitted).

6. 71 Cal. 2d 1096, 458 P.2d 713, 80 Cal. Rptr. 633 (1969).

7. In *Edwards*, and subsequently in *People v. Bradley*, 1 Cal. 3d 80, 460 P.2d 129, 81 Cal. Rptr. 457 (1969), Justice Burke substituted the word "exhibited" for "harbored" in the majority opinion. This substitution led Justice Tobriner to observe in his separate opinion in *Bradley* that Justice Burke had thus narrowed the scope of protection because the word "harbored" had encompassed both the subjective and the overt expectations of the individual. *Id.* at 91 n.1, 460 P.2d at 133 n.1, 81 Cal. Rptr. at 461 n.1 (Tobriner, J., concurring and dissenting). Justice Tobriner believes, nevertheless, that *Edwards* displays Justice Burke's "sensitivity to the rights of the individual as against the powerful institution of government." Tobriner, *Justice Louis H. Burke—A Tribute*, 9 LOY. L.A.L. REV. 3, 7 (1975). Although neither word fully describes the individual's right to Fourth Amendment protection, see *Perspectives*, *supra* note 1, at 384-85, guidelines are necessary as an aid to the police and the courts in evaluating the nature of an individual's activities and expectations.

8. 71 Cal. 2d at 1100, 458 P.2d at 715, 80 Cal. Rptr. at 635. Justice Burke first referred to *Katz* in *People v. Terry*, 70 Cal. 2d 410, 427, 454 P.2d 36, 47-48, 77 Cal. Rptr. 460, 471-72 (1969),

Lower state courts subsequently refused to suppress evidence on grounds of an unreasonable search where the expectation of privacy was not itself reasonable to the average person, even if the evidence were obtained by an inordinate exercise of police power.⁹ Broad, objective standards that can accommodate the myriad situations encountered by the police are, of course, preferable to hindsight examinations of the reasonableness of police actions; thus, it is not surprising that the California courts quickly annexed the *Edwards* test in order to implement *Katz*.¹⁰ That standard permitted the courts to avoid an ex post facto examination of the reasonableness of police conduct, except where the defendant had exhibited a reasonable expectation of privacy while in public view.

*People v. Triggs*¹¹ is a fine measure of Chief Justice Wright's concern for individual privacy as well as his appreciation of the difficulties faced by police and courts in preserving that right in an ordered society. In this regard, he recognized that the *Edwards* standard was only a starting point for a more complex analysis of the legality of a particular warrantless intrusion and that the right to personal privacy was enjoyed by all citizens, the innocent as well as the guilty.¹² He emphasized that the particular police

but he did not propose a standard by which the courts could measure potential infringement of the right of privacy. The *Edwards* test was subsequently utilized by Justice Burke to suppress evidence obtained in a police search of a trash barrel placed on the street for collection, *People v. Krivda*, 5 Cal. 3d 357, 365-67, 486 P.2d 1262, 1268-69, 96 Cal. Rptr. 62, 68-69 (1971), and to suppress a tape recording of a jailhouse conversation between an arrestee and his wife, *North v. Superior Court*, 8 Cal. 3d 301, 308-12, 502 P.2d 1305, 1309-12, 104 Cal. Rptr. 833, 837-40 (1972). Chief Justice Wright dissented in *North*. See notes 25-30 and accompanying text *infra*.

9. See, e.g., *People v. Mullins*, 50 Cal. App. 3d 61, 123 Cal. Rptr. 201 (1975) (approving an officer's late night, warrantless trespass onto secluded rural property to search for marijuana plants); *People v. Superior Court (Stroud)*, 37 Cal. App. 3d 836, 112 Cal. Rptr. 764 (1974) (approving use of helicopters by police to search for stolen automobile parts in a back yard); *Dean v. Superior Court*, 35 Cal. App. 3d 112, 110 Cal. Rptr. 885 (1973) (approving use of helicopters by police to search for marijuana in rural fields). But cf. *People v. Sneed*, 32 Cal. App. 3d 535, 108 Cal. Rptr. 146 (1973) (reasonable expectation of privacy to be free from observation by helicopter hovering 25 feet above the ground). See generally Comment, *Police Helicopter Surveillance and Other Aided Observations: The Shrinking Reasonable Expectation of Privacy*, 11 CAL. W.L. REV. 505 (1975).

10. See, e.g., *People v. Bradley*, 1 Cal. 3d 80, 460 P.2d 129, 81 Cal. Rptr. 457 (1969) (officers illegally entered open door of residence when defendant appeared to be asleep); *People v. Myles*, 6 Cal. App. 3d 788, 86 Cal. Rptr. 274 (1970) (officers illegally looked through gap at bottom of blind from outside ledge of kitchen window); *Cohen v. Superior Court*, 5 Cal. App. 3d 429, 85 Cal. Rptr. 354 (1970) (officers illegally looked through window from fourth floor fire escape). Compare *Vickery v. Superior Court*, 10 Cal. App. 3d 110, 88 Cal. Rptr. 834 (1970) (officer legally opened latch on rear gate to go to back door to prevent possible escape; at the door, he legally looked through the kitchen window) with *Vidaauri v. Superior Court*, 13 Cal. App. 3d 550, 91 Cal. Rptr. 704 (1970) (a person who surrounds his backyard with a fence exhibits a reasonable expectation of privacy whether the gate is locked or not).

11. 8 Cal. 3d 884, 506 P.2d 232, 106 Cal. Rptr. 408 (1973). See notes 32-44 and accompanying text *infra*.

12. The Chief Justice made the following observation in this regard: "In seeking to honor

method used to invade that right was a measure of the reasonableness of the individual's expectation of privacy. If the court found that the method of invasion constituted a search within the meaning of the Fourth Amendment, its legality would depend on a further finding that the method was itself reasonable in light of an average person's expectations as to the potential for visual observation of his behavior. The purpose of this commentary is to examine the significant opinions authored by Chief Justice Wright on search and seizure and the right of privacy, in light of the *Triggs* decision. Through a chronological case study, the Chief Justice's view on the inadequacies of the *Edwards* standard will emerge. The conclusion will suggest the possible future development of the *Triggs* concept of personal privacy in California.

I. The Development of a New Concept of Privacy

A. Early Opinions

In a 1972 opinion for an unanimous court, Chief Justice Wright ordered the suppression of some seized marijuana and an incriminating tape recording between a jailed man and his wife.¹³ The affidavit offered in support of the search warrant, which authorized seizure of the marijuana, had failed to fully inform the magistrate of the underlying circumstances on which the informant had based his conclusions regarding the location of the contraband.¹⁴ The electronic surveillance of the telephone call had been conducted without prior judicial approval, and thus violated Title III¹⁵ of the

reasonable expectations of privacy through our application of search and seizure law, we must consider the expectations of the innocent as well as the guilty. When innocent persons are subjected to illegal searches—including when, as here, they do not even know their private parts and bodily functions are being exposed to the gaze of the law—their rights are violated even though such searches turn up no evidence of guilt. Save through the deterrent effect of the exclusionary rule there is little courts can do to protect the constitutional right of persons innocent of any crime to be free of unreasonable searches.” 8 Cal. 3d at 893, 506 P.2d at 237-38, 106 Cal. Rptr. at 413-14.

13. *Halpin v. Superior Court*, 6 Cal. 3d 885, 495 P.2d 1295, 101 Cal. Rptr. 375 (1972). In his first search and seizure opinion for the California Supreme Court, *Mann v. Superior Court*, 3 Cal. 3d 1, 472 P.2d 468, 88 Cal. Rptr. 380 (1970), Chief Justice Wright had “assumed without deciding” that police officers who lacked probable cause to search had consequently violated a “constitutional right to privacy” when they entered private property at night and hid behind bushes in front of partially shaded windows, “from which vantage point they could see what was going on inside the house.” *Id.* at 7, 472 P.2d at 471, 88 Cal. Rptr. at 383. The *Edwards* test fit the facts: the householders’ expectation of privacy was reasonable, only the police intrusion was not. In *Mann*, Chief Justice Wright and Justice Peters also began a series of debates on the proper limits of the exclusionary standard. The debate continued in *Lockridge v. Superior Court*, 3 Cal. 3d 166, 474 P.2d 683, 89 Cal. Rptr. 731 (1970), and in *Krauss v. Superior Court*, 5 Cal. 3d 418, 487 P.2d 1023, 96 Cal. Rptr. 1023 (1970). For purposes of this commentary, it is necessary only to note that Chief Justice Wright recognized reasonable expectations of privacy in these cases. For a review of the controversy, see *The Supreme Court of California, 1970-1971*, 60 CALIF. L. REV. 757, 870-81 (1972).

14. 6 Cal. 3d at 892-96, 495 P.2d at 1299-1302, 101 Cal. Rptr. at 379-82.

15. 18 U.S.C. §§ 2510-20 (1970 & Supp. V 1975).

Omnibus Crime Control and Safe Streets Act of 1968,¹⁶ which had preempted California law on this point.¹⁷ The court failed to resolve whether the jail authorities had, however, invaded the couple's right of privacy by monitoring and recording their call.¹⁸

Seven months later, in *North v. Superior Court*,¹⁹ a plurality opinion ordered the suppression of a tape-recorded conversation between an arrestee and his wife.²⁰ In that case, the defendant's wife visited him at the police station shortly after his arrest. A detective permitted the couple to use his office in private. Relying heavily on *Edwards* and *Katz*,²¹ the court concluded that although an inmate ordinarily had no right to an expectation of privacy, the police might create that right by "[lulling the inmate] into believing that [his] conversation would be confidential."²² Coupled with the statutory presumption that a conversation between spouses is made in confidence,²³ those circumstances established the defendant's right of privacy,²⁴ which had been violated in this case by monitoring and tape recording the conversation.

In dissent on this issue, Chief Justice Wright noted that the legislature had not included spousal conversation among the privileged prisoner communications.²⁵ "There is likewise no sufficient constitutional ground upon which we could or should depart from the well-established rule that a prisoner in custody has no reasonable expectation of privacy."²⁶ He agreed with the rule advocated in Justice Sullivan's separate dissent that the "place of the communication, not the relationship of the communicating parties"

16. Pub. L. No. 90-351, 82 Stat. 197 (1968) (codified in scattered sections of 18 U.S.C.).

17. 6 Cal. 3d at 896-900, 1495 P.2d at 1302-06, 101 Cal. Rptr. at 382-86. Chief Justice Wright noted that Title III is primarily concerned with protecting the right of privacy of all citizens. *Id.* at 898 & n.15, 495 P.2d at 1304 & n.15, 101 Cal. Rptr. at 384 & n.15 (citing S. REP. NO. 1097, 90th Cong., 2d Sess. 66, 88-89 (1968), reprinted in [1968] U.S. CODE CONG. & AD. NEWS 2112). See also Comment, *Electronic Surveillance in California: A Study In State Legislative Control*, 57 CALIF. L. REV. 1182 (1969).

18. 6 Cal. 3d at 900 & n.21, 495 P.2d at 1305 & n.21, 101 Cal. Rptr. at 385 & n.21.

19. 8 Cal. 3d 301, 502 P.2d 1305, 104 Cal. Rptr. 833 (1972).

20. Chief Justice Wright, joined by Justice McComb, dissented on this issue. *Id.* at 312-13, 502 P.2d at 1312, 104 Cal. Rptr. at 840 (Wright, C.J., concurring and dissenting). Justice Tobriner agreed with the plurality, and was joined by Justice Peters. *Id.* at 314, 502 P.2d at 1312-13, 104 Cal. Rptr. at 840-41 (Tobriner, J., concurring and dissenting). Justice Sullivan separately dissented on the issue. *Id.* at 317-19, 502 P.2d at 1313-16, 104 Cal. Rptr. at 841-44 (Sullivan, J., dissenting). See generally *The Supreme Court of California, 1971-1972*, 61 CALIF. L. REV. 287, 457-67 (1973).

21. 8 Cal. 3d at 308-11, 502 P.2d at 1309-11, 104 Cal. Rptr. at 837-39.

22. *Id.* at 311, 502 P.2d at 1311, 104 Cal. Rptr. at 839.

23. CAL. EVID. CODE § 917 (West 1966).

24. 8 Cal. 3d at 312, 502 P.2d at 1311, 104 Cal. Rptr. at 839.

25. *Id.* at 313, 502 P.2d at 1312, 104 Cal. Rptr. at 840 (Wright, C.J., concurring and dissenting).

26. *Id.*

was the factor relevant to the inquiry.²⁷ As Justice Sullivan noted: "Measured against an objective standard, I conclude that no reasonable person in defendant's position could have had [an expectation of privacy]." ²⁸ Under these circumstances "only a fatuous or naive defendant would close his eyes to the realities and assume that he was no longer in custody . . . and that his jail, like his home, had in some unaccountable way become his castle."²⁹ The dissenters in *North* therefore relied on the pre-*Katz* concept of "protected areas" or places in which no one has the right to an expectation of privacy unless recognized by statute.³⁰

None of the opinions indicated whether *North*, who was arrested with probable cause for serious crimes, had been arraigned prior to his wife's visit. It is conceivable that a pre-arraigned arrestee has an expectation of privacy warranting careful examination of the police methods used to lure him to confide in another, especially when the police hope such methods will bolster the case against the arrestee.³¹ Chief Justice Wright soon devised a new interpretation of "reasonable expectation of privacy" that could be used to support this mode of analysis.

B. *People v. Triggs*

In *People v. Triggs*,³² plainclothed officers saw the defendant enter a public restroom followed by another man ten minutes later. From a plumbing access area between the men's and women's restrooms, one officer looked through a vent above the doorless restroom stalls³³ and saw the

27. *Id.* at 317, 502 P.2d at 1315, 104 Cal. Rptr. at 843 (Sullivan, J., dissenting) (emphasis omitted).

28. *Id.* at 318, 502 P.2d at 1316, 104 Cal. Rptr. at 844.

29. *Id.* at 319, 502 P.2d at 1316, 104 Cal. Rptr. at 844.

30. Justice Sullivan's dissent contains citations to many cases that predate *Katz*, all of which held "that persons in custody ordinarily have no reasonable expectation of privacy." *Id.* at 317, 502 P.2d at 1315, 104 Cal. Rptr. at 843 (Sullivan, J., dissenting). The plurality noted that all people in custody must sacrifice some privacy so that the authorities may maintain security and prevent escapes, 8 Cal. 3d at 309, 502 P.2d at 1309, 104 Cal. Rptr. at 837 (citing *People v. Morgan*, 197 Cal. App. 2d 90, 93, 16 Cal. Rptr. 838, 840 (1961)), but recognized that the marital communication privilege is a competing consideration. *See id.*, 502 P.2d at 1309, 104 Cal. Rptr. at 837.

31. The likelihood that a particular arrestee might attempt escape is, for example, countered by the fact that the primary police motivation may have been to elicit additional incriminating evidence before taking the arrestee before the magistrate. This balancing of competing interests is basic to the implementation of the Fourth Amendment: a substantial reason to favor the governmental interest must accompany every search. *See, e.g., Camara v. Municipal Court*, 387 U.S. 523, 535-37 (1967); *See v. City of Seattle*, 387 U.S. 541 (1967); *People v. Norman*, 14 Cal. 3d 929, 937 n.8, 538 P.2d 237, 243 n.8, 123 Cal. Rptr. 109, 115 n.8 (1975); *Jesmore, The Courthouse Search*, 21 U.C.L.A. L. REV. 797, 825 (1974) [hereinafter cited as *The Courthouse Search*]. *See* note 55 and accompanying text *infra*.

32. 8 Cal. 3d 884, 506 P.2d 232, 106 Cal. Rptr. 408 (1973).

33. The officer testified that he had entered the plumbing access area about 50 times for the purpose of watching the restrooms. *Id.* at 888-89, 506 P.2d at 235, 106 Cal. Rptr. at 411.

defendant engaging in statutorily proscribed sexual conduct³⁴ with the other man. The officer later admitted that he had spied on the men without probable cause to believe they were engaging in illegal acts. Chief Justice Wright, speaking for an unanimous court, held that the officer's clandestine observation violated the defendant's right to privacy because it was a search within the purview of the Fourth Amendment. The lack of probable cause rendered the officer's testimony concerning his observations constitutionally inadmissible.³⁵

In reaching this conclusion, Chief Justice Wright rejected several Court of Appeal cases that had held that the legality of police spying on a restroom depended on whether the toilet stalls had doors³⁶ and he made a conceptual breakthrough in the area of personal privacy.³⁷ Under the rationale of those cases, the reasonableness of the expectation of privacy was based solely on the ability of the public to observe the conduct in question. If the defendant's activity was open to public view because the toilet stall lacked a door, judicial inquiry into the reasonableness of the officer's clandestine observations was foreclosed because the defendant could not reasonably have expected his conduct to be private.³⁸ Chief Justice Wright's determination that even persons in places open to public view may be entitled to privacy³⁹

34. See Law of April 27, 1955, ch. 274, § 1, 1955 Cal. Stats. 729 (current version at CAL. PENAL CODE § 288a (West Supp. 1977)) (forbade oral copulation between consenting adults). The law was amended in 1975 to remove this proscription. See Law of Sept. 18, 1975, ch. 877, § 2, 1975 Cal. Stats. 1958. Adults who orally copulate in public may thereby violate other laws, however. See, e.g., CAL. PENAL CODE § 647(a), (d) (West Supp. 1977).

35. 8 Cal. 3d at 895, 506 P.2d at 239, 106 Cal. Rptr. at 415. Speaking for the court, Chief Justice Wright also found that the officer violated section 653n of the California Penal Code, which prohibits the use of two-way mirrors permitting observation of any restroom, toilet, or bathroom. *Id.* at 893-94, 506 P.2d at 238, 106 Cal. Rptr. at 414. See *Personal Privacy*, *supra* note 1, at 576-77.

36. See, e.g., *People v. Crafts*, 13 Cal. App. 3d 457, 91 Cal. Rptr. 563 (1970); *People v. Heath*, 266 Cal. App. 2d 754, 72 Cal. Rptr. 457 (1968); *People v. Roberts*, 256 Cal. App. 2d 488, 64 Cal. Rptr. 70 (1967); *People v. Maldonado*, 240 Cal. App. 2d 812, 50 Cal. Rptr. 45 (1966); *People v. Hensel*, 233 Cal. App. 2d 834, 43 Cal. Rptr. 865 (1965); *People v. Young*, 214 Cal. App. 2d 131, 29 Cal. Rptr. 492 (1963); *People v. Norton*, 209 Cal. App. 2d 173, 25 Cal. Rptr. 676 (1962).

The California Supreme Court had last considered the legality of clandestine restroom observations in 1962. *Britt v. Superior Court*, 58 Cal. 2d 469, 374 P.2d 817, 24 Cal. Rptr. 489 (1962); *Bielicki v. Superior Court*, 57 Cal. 2d 602, 371 P.2d 288, 21 Cal. Rptr. 522 (1962). In both cases, the court considered expectations of privacy but also concentrated on the "manner in which the police observed a place . . . which is ordinarily understood to afford personal privacy to individual occupants." *Britt v. Superior Court*, 58 Cal. 2d 469, 472, 374 P.2d 817, 819, 24 Cal. Rptr. 489, 851 (1962). See *Personal Privacy*, *supra* note 1, at 587-93. The emphasis in *Britt* on the "means of observation" was disregarded in the subsequent cases. 8 Cal. 3d at 890, 506 P.2d at 236, 106 Cal. Rptr. at 412.

37. For a thorough analysis of the significance of *Triggs*, see *Personal Privacy*, *supra* note 1.

38. 8 Cal. 3d at 890, 506 P.2d at 236, 106 Cal. Rptr. at 412.

thus shifted the focus of judicial inquiry to the method by which the police make their observations.⁴⁰ Where the method employed is clandestine in nature, as it was in *Triggs*, the legality of the search will depend upon whether the officer making the observation had probable cause.⁴¹

The scope and meaning of *Triggs* is still uncertain.⁴² Although the court has subsequently implied that it will consider principles akin to those developed in *Triggs*,⁴³ progress toward a definitive standard has been slow.

39. "The expectation of privacy a person has when he enters a rest room is reasonable and is not diminished or destroyed because the toilet stall being used lacks a door." *Id.* at 891, 506 P.2d at 236, 106 Cal. Rptr. at 412.

40. See *id.* at 890, 506 P.2d at 236, 106 Cal. Rptr. at 412. See note 36 *supra*.

41. *Id.* at 894, 506 P.2d at 238-39, 106 Cal. Rptr. at 414-15. "Unless he has probable cause to search, an officer has no right to retreat to a clandestine position" to watch private activity. *Id.* at 894 n.7, 506 P.2d at 238 n.7, 106 Cal. Rptr. at 414 n.7. Chief Justice Wright assumed without deciding, however, that a warrant was not required for the search if the police had probable cause. *Id.* at 894, 506 P.2d at 238, 106 Cal. Rptr. at 414. The court subsequently held that probable cause to arrest did not justify warrantless spying except in certain situations. *Lorenzana v. Superior Court*, 9 Cal. 3d 626, 639-40, 511 P.2d 33, 42-43, 108 Cal. Rptr. 585, 594-95 (1973). See note 43 *infra*.

42. See *Personal Privacy*, *supra* note 1, at 597-601. The court did not provide reasons for the conclusion that a person has a right of privacy even in a doorless stall. This omission might have been deliberate in order to leave the lower courts free to define the degree of privacy that could be expected in different places.

43. See, e.g., *Lorenzana v. Superior Court*, 9 Cal. 3d 626, 511 P.2d 33, 108 Cal. Rptr. 585 (1973). Justice Tobriner, joined by Chief Justice Wright and Justices Mosk and Sullivan, concluded that an officer violated a householder's reasonable expectation of privacy by walking across a short strip of land to peer through a two inch gap between the bottom of a window shade and the window sill. Before citing *Triggs* and *Edwards*, the court made a few observations that fit the *Triggs* approach. Even if the strip could be considered a "normal [public] access route" to the home, that route would not lead "to a point within a scant six inches from the window." *Id.* at 636, 511 P.2d at 40-41, 108 Cal. Rptr. at 592-93. More importantly, "[t]he fact that apertures existed in the window, so that an unlawfully intruding individual so motivated could spy into the residence, [did] not dispel the reasonableness of the occupants' expectation of privacy." *Id.* at 636, 511 P.2d at 41, 108 Cal. Rptr. at 593. After reviewing *Katz* and Justice Harlan's concurrence therein, the court looked "to the conduct of people in regard to" the area. *Id.* at 638, 511 P.2d at 44, 108 Cal. Rptr. at 592. An occupant cannot claim "he expected privacy from all observations of the officer who stands upon" ground that has been opened to public use. *Id.* Implicit in this language may be the belief, initially expressed in *Triggs*, that some observations of an officer made from an area open to the public may be unreasonable in that their clandestine nature violates a reasonable expectation of privacy. *Id.* at 639, 511 P.2d at 42, 108 Cal. Rptr. at 594.

Within a few months after *Lorenzana*, the court established a three-tiered hierarchy of "places" entitled to different expectations of privacy. *People v. Dumas*, 9 Cal. 3d 871, 882 & nn. 8-10, 512 P.2d 1208, 1216 & nn. 8-10, 109 Cal. Rptr. 304, 312 & nn. 8-10 (1973) (opinion by Justice Mosk). This division created "a single standard of reasonableness to [be applied to] all places in accordance with a fundamental understanding that a particular intrusion" into one place might seriously threaten personal security, while the same intrusion into another domain might not. *Id.* at 883, 512 P.2d at 1216, 109 Cal. Rptr. at 312. Chief Justice Wright and Justice Tobriner joined in Justice Sullivan's concurrence, disagreeing with "the majority's gratuitous attempt to establish a hierarchy of Fourth Amendment protection dependent upon fictional

The *Edwards* standard has, however, lost some of its vitality. Since *Triggs*, the California Supreme Court has rarely relied upon *Edwards* in determining an individual's right of privacy.⁴⁴

II. "Reasonable" Intrusions on Privacy

A. Airport Searches

By 1974, the California Supreme Court had received many petitions in which the parties argued that airport security investigations were violative of the Fourth Amendment because they constituted warrantless, personal searches that were conducted without probable cause. In *People v. Hyde*,⁴⁵ an unanimous court found that properly circumscribed screening procedures were constitutional, but split 4-3 on the correct rationale. Relying on precedent established by administrative inspection cases,⁴⁶ the *Hyde* majority concluded that such searches were permissible because they were part of a necessary regulatory scheme that insured that dangerous weapons were not carried aboard an airplane, rather than part of a criminal investigation to obtain evidence of a specific offense.⁴⁷ On balance, the government's need to inspect carry-on baggage and the individual's person outweighed the passenger's right to be free from this inoffensive intrusion.⁴⁸

Chief Justice Wright's concurrence in *Hyde* illustrated both his disagreement with the rationale adopted by the majority⁴⁹ and his belief that the minimal amount of governmental intrusion necessary to alleviate the evil was reasonable under the Fourth Amendment.⁵⁰ Because the individual is

levels or degrees of privacy which persons supposedly assign to houses, cars, trucks and trash cans." *Id.* at 886, 512 P.2d at 1219, 109 Cal. Rptr. at 315 (Sullivan, J., concurring). The classification "tends to dilute, if not annul, our responsibility to determine whether, under the circumstances of each case, a warrantless search is unreasonable and in violation of the Fourth Amendment." *Id.* The *Dumas* opinion should not be read to weaken *Triggs*, which itself concerned an area more public in nature than a home or an automobile.

44. *See, e.g.*, *Guidi v. Superior Court*, 10 Cal. 3d 1, 6, 513 P.2d 908, 911, 109 Cal. Rptr. 684, 687 (1973); *Lorenzana v. Superior Court*, 9 Cal. 3d 626, 638-39, 511 P.2d 33, 42, 108 Cal. Rptr. 585, 594 (1973).

45. 12 Cal. 3d 158, 524 P.2d 830, 115 Cal. Rptr. 358 (1974). *See The Courthouse Search*, *supra* note 31, at 809-15.

46. *Id.* at 165-68, 524 P.2d at 834-36, 115 Cal. Rptr. at 362-64. *See, e.g.*, *United States v. Biswell*, 406 U.S. 311 (1972); *Wyman v. James*, 400 U.S. 309 (1971); *See v. City of Seattle*, 387 U.S. 541 (1967); *Camara v. Municipal Court*, 387 U.S. 523 (1967).

47. 12 Cal. 3d at 165-66, 524 P.2d at 834, 115 Cal. Rptr. at 362.

48. *Id.* at 166-67, 524 P.2d at 835, 115 Cal. Rptr. at 363.

49. Chief Justice Wright suggested that by relying on the administrative inspection cases, the majority failed to give proper weight to the distinguishing features of the airport screening procedures. *Id.* at 170, 524 P.2d at 837, 115 Cal. Rptr. at 365 (Wright, C.J., concurring). He reasoned that the government's needs at the airport justified a reduced level of Fourth Amendment protection. *Id.* at 174, 524 P.2d at 840-41, 115 Cal. Rptr. at 368-69.

50. *Id.* at 177, 524 P.2d at 843, 115 Cal. Rptr. at 371. *Cf. People v. Farlow*, 52 Cal. App. 3d

entitled to privacy even in a quasi-public facility,⁵¹ airport screening procedures must safeguard prospective passengers from unnecessary invasion of their privacy in order to pass constitutional muster. Chief Justice Wright pointed to three considerations that tended to ameliorate the intrusion incident to an airport screening investigation. First and foremost, the prospective passenger was given advance notice of the screening. "[A]s a factor of major significance in evaluating the extent to which individual privacy is compromised and intruded upon by government [action, advance] notice enables the individual to avoid the embarrassment and psychological dislocation that a surprise search causes."⁵² Second, the prospective passenger could elect not to proceed with the screening and this, in turn, lessened the psychological impact attendant to conventional searches in which there was no choice but to submit to the invasion.⁵³ Third, most prospective passengers welcomed nondiscriminatory, limited searches as a safety precaution.⁵⁴ The airport security check that did invade individual privacy was thus minor when balanced against the government's compelling need to prevent hijackings and its inability to search only those individuals who posed a real threat to security.⁵⁵

Chief Justice Wright's respect for the individual's right of privacy thus remained unaltered by his concurrence in *Hyde*.⁵⁶ His opinion in that case

414, 125 Cal. Rptr. 118 (1975) (airport search of a jacket carried over defendant's arm in which cocaine was found in a cigarette box was reasonable).

51. See 12 Cal. 3d at 175, 524 P.2d at 841, 115 Cal. Rptr. at 369 (Wright, C.J., concurring).

52. *Id.* at 175-76, 524 P.2d at 842, 115 Cal. Rptr. at 370.

53. *Id.* at 176, 524 P.2d at 842, 115 Cal. Rptr. at 370. Chief Justice Wright noted that the United States Supreme Court has recognized that this psychological impact is a factor bearing upon the reasonableness of an intrusion. *Id.* at 176 n.14, 524 P.2d at 842 n.14, 115 Cal. Rptr. at 370 n.14. See, e.g., *Terry v. Ohio*, 392 U.S. 1, 25 (1968); *Camara v. Municipal Court*, 387 U.S. 523, 537 (1967).

54. 12 Cal. 3d at 177, 524 P.2d at 843, 115 Cal. Rptr. at 371 (Wright, C.J., concurring).

55. *Id.* Chief Justice Wright was careful to note that this balancing approach did not diminish the overall protection of the Fourth Amendment: "The standards applicable to conventional searches and seizures remain unaltered." *Id.* For a discussion of the balancing approach, see Greenberg, *The Balance of Interests Theory and the Fourth Amendment: A Selective Analysis of Supreme Court Action Since Camara and See*, 61 CALIF. L. REV. 1011 (1973).

Both majority and concurring opinions have been criticized for adopting a balancing test to gauge the reasonableness of a security search. See *The Supreme Court of California, 1973-1974*, 63 CALIF. L. REV. 9, 176-79 (1975). Whether any serious threat to public safety, such as the armed robbery of a bank, justifies such an unprecedented modification of traditional Fourth Amendment standards raises difficult constitutional questions. The commentators have thus suggested that a more rational approach to the problem before the *Hyde* court would have been to create a new, but well-delineated, exception to the Fourth Amendment. See *id.* at 180.

56. *People v. Bracamonte*, 15 Cal. 3d 394, 540 P.2d 624, 124 Cal. Rptr. 528 (1975), for example, exemplifies Chief Justice Wright's belief that privacy of person must be protected from unreasonable searches and seizures. *Id.* at 404-05, 540 P.2d at 631, 124 Cal. Rptr. at 535 (citing *Schmerber v. California*, 384 U.S. 757 (1966)). In that case, defendant swallowed balloons in response to a police confrontation in which a search warrant authorized the search

shows more than mere disagreement with the majority's analogy to administrative search cases. Chief Justice Wright's basic concern may well have been that the court should avoid the use of regulatory inspection decisions to justify incursions into individual privacy that are partially intended to reveal evidence of criminal conduct.⁵⁷

B. Street Confrontations

Chance encounters between the police and persons suspected of criminal activity have frequently provided the court with an opportunity to define the parameters of the Fourth Amendment. Chief Justice Wright did not apply the innovative *Triggs* rationale in his last two opinions on street confrontations⁵⁸ because in neither case was the method of observation employed by the police at issue. In both situations, the police observed violations of the traffic laws on public thoroughfares. The legality of the police conduct after the defendants were brought into legal custody was the issue before the court.

In *People v. Norman*,⁵⁹ a motorist who was driving at night without headlights drove off when an officer attempted to detain him. He was finally forced to a stop and stepped out of his truck holding a black, cylindrical

of her person. An officer with probable cause to believe defendant had swallowed containers of drugs asked hospital personnel to pump her stomach. The defendant pleaded that the procedure of forcing a tube through a nostril and into her esophagus was too painful, agreed to drink an emetic, and soon regurgitated several balloons containing heroin. The entire court joined Chief Justice Wright in concluding that the intrusion violated the Fourth Amendment for lack of reasonableness. *Id.* at 399-400, 540 P.2d at 627-28, 124 Cal. Rptr. at 531-32. The court reasoned that the search warrant did not authorize an intrusion beyond the surface of the body, that no emergency existed (the court found no evidence that it was necessary to pump the defendant's stomach to save her life, *id.* at 401-02 & n.5, 540 P.2d at 629 & n.5, 124 Cal. Rptr. at 533 & n.5), and that the search was not incident to the arrest. "[M]ore than probable cause [is necessary] to believe that contraband will be found. . . . There must also be the need to prevent the arrested person from . . . destroying evidence." *Id.* at 403, 540 P.2d at 630, 124 Cal. Rptr. at 534. No such need existed because the balloons would have passed through defendant's digestive tract by natural processes. Thus, the intrusion was more than minor; it was of intolerable intensity and scope. *Id.* at 404-05, 540 P.2d at 631, 124 Cal. Rptr. at 535. As in his concurrence in *Hyde*, the Chief Justice demanded that the police use the least offensive intrusion possible to discover evidence of crime; any greater intrusion was presumptively unreasonable. See notes 49-55 and accompanying text *supra*.

57. It is easy to hold that the degree of governmental intrusion upon personal privacy must be reasonably proportionate to the government's need, or that both personal expectations of privacy and police intrusions must be reasonable. These formulas offer little guidance to police, however, "in rapidly unfolding . . . situations" that require an "escalating set of flexible responses, graduated in relation to the amount of information [possessed by the police]." *Terry v. Ohio*, 392 U.S. 1, 10 (1968). A sliding-scale approach derived from prior confrontations might, however, further complicate implementation of the Fourth Amendment. See *Perspectives*, *supra* note 1, at 390-94.

58. *Wimberly v. Superior Court*, 16 Cal. 3d 557, 547 P.2d 417, 128 Cal. Rptr. 641 (1976); *People v. Norman*, 14 Cal. 3d 929, 538 P.2d 237, 123 Cal. Rptr. 109 (1975).

59. 14 Cal. 3d 929, 538 P.2d 237, 123 Cal. Rptr. 109 (1975).

object that appeared to be a gun. Ordered to drop the object, the driver tossed it under his truck. A fellow officer retrieved the object, which was a soft tobacco pouch, opened it, and found narcotics inside. Chief Justice Wright, joined by three other justices,⁶⁰ agreed with the trial court's conclusion that the search was illegal.⁶¹ Because the defendant dropped the pouch in response to a police order, the action was not furtive and did not warrant the belief that evidence of a crime was being concealed.⁶² Similarly, the search was not necessary to prevent a person in custody from retrieving a weapon.⁶³ While testifying at trial, one officer admitted that he thought it was not a gun when the pouch hit the pavement without making any noise; his suspicion was confirmed when he picked it up and discovered it was soft.⁶⁴ Lacking probable cause to believe the pouch contained a weapon, the officer's search was impermissible. On balance, defendant's expectation of privacy outweighed the need for the search.⁶⁵

In 1973, the court had declared that although an automobile carried a considerable expectation of privacy, this expectation was not as intense or

60. Justices Mosk, Tobriner, and Sullivan agreed. Justice Richardson concurred on the issue relevant to this discussion. Justice McComb joined Justice Clark's dissent. *Id.*

61. The magistrate had denied Norman's motion to suppress evidence at the preliminary hearing. Norman moved in the trial court to set aside the information on the ground that the only material evidence was seized as the result of an illegal search. The court granted the motion to set aside the information. *Id.* at 931, 538 P.2d at 239, 123 Cal. Rptr. at 111.

62. *Id.* at 933, 538 P.2d at 240, 123 Cal. Rptr. at 112. Certain furtive movements establish probable cause for a search if an officer can reasonably infer from the timing and direction of the suspect's movements that he is hiding contraband. *See People v. Superior Court (Kiefer)*, 3 Cal. 3d 807, 817, 478 P.2d 449, 454, 91 Cal. Rptr. 729, 734 (1970).

63. 14 Cal. 3d at 936, 538 P.2d at 243, 123 Cal. Rptr. at 115. The court noted that although the officers may have had the option of taking Norman before a magistrate, they had no probable cause to believe he possessed a weapon, instrumentalities of a crime, or contraband. *Id.* at 935, 538 P.2d at 242, 123 Cal. Rptr. at 114. Absent probable cause to believe weapons are in the car or on the arrestee's person, "the driver's expectation of privacy outweighed any need to search for the officer's protection." *Id.* at 937 n.8, 538 P.2d at 243 n.8, 123 Cal. Rptr. at 115 n.8 (citing *People v. Superior Court (Simon)*, 7 Cal. 3d 186, 206, 496 P.2d 1205, 1219-20, 101 Cal. Rptr. 837, 851-52 (1972)). A driver's initial expectation of privacy remains unchanged, even if he is later booked for a traffic offense.

64. *Id.* at 936-37, 538 P.2d at 243, 123 Cal. Rptr. at 115. A weapons search must be limited to a scope necessary to accomplish its purpose. *See M. KRAUSE, CALIFORNIA SEARCH AND SEIZURE PRACTICE* § 5.2, at 157 (1976). A soft package does not ordinarily contain a weapon. *People v. Mosher*, 1 Cal. 3d 379, 394, 461 P.2d 659, 668, 82 Cal. Rptr. 379, 388 (1969).

65. 14 Cal. 3d at 938, 538 P.2d at 244, 123 Cal. Rptr. at 116. The remainder of Chief Justice Wright's opinion reaffirmed the court's previous conclusion that it could impose a higher constitutional standard for searches and seizures on the basis of the California Constitution than had been imposed by the United States Supreme Court on the basis of the federal Constitution. *See People v. Brisendine*, 13 Cal. 3d 528, 548-52, 531 P.2d 1099, 1111-15, 119 Cal. Rptr. 315, 327-31 (1975). The dissenters and Justice Richardson, otherwise concurring, would have held California to the standard set by the United States Supreme Court, which essentially permits a full body search of any arrestee. *See, e.g., Gustafson v. Florida*, 414 U.S. 260 (1973); *United States v. Robinson*, 414 U.S. 218 (1973).

insistent as that found in the home or office.⁶⁶ As a result, the court subsequently held that a warrantless search of an automobile could be justified on probable cause alone.⁶⁷ Several courts of appeal soon reached contrary results on the issue of whether police officers who had probable cause to search the interior of an automobile could expand that search without a warrant to concealed areas such as the trunk.⁶⁸ *Wimberly v. Superior Court*⁶⁹ provided the California Supreme Court with an opportunity to reaffirm its adherence to the Fourth Amendment principles first voiced in *Katz*.⁷⁰

In *Wimberly*, two officers made a proper traffic stop. Using a flashlight,⁷¹ one officer peered into the automobile and saw twelve distinctive seeds on the floor next to a pipe. After the officer sniffed the pipe and smelled burnt marijuana, he searched the interior of the car. He found a plastic bag containing a small amount of marijuana in a jacket pocket. When the trunk compartment was opened with the car's keys, the officers found several pounds of marijuana. While concluding that the officers' plain view of the seeds afforded probable cause for the seizure of the pipe and the subsequent interior search of the car,⁷² the court held that the search of the trunk was an intrusion into a distinct part of the car in which there was a reasonably greater expectation of privacy than in the passenger compartment.⁷³ The court noted that the reasonableness of an officer's decision to search without a warrant depended upon the existence of specific facts that create a reasonable belief that seizable items are in fact being concealed.⁷⁴ Had the officers found a substantial quantity in the passenger compartment, they would have had sufficient reason to believe that a similar quantity was

66. *People v. Dumas*, 9 Cal. 3d 871, 882-83, 512 P.2d 1208, 1215-16, 109 Cal. Rptr. 304, 311-12 (1973). See note 43 *supra*.

67. If the police had probable cause to believe that an automobile stopped on the highway contained contraband or evidence of crime, they were allowed to search in areas where they might reasonably expect to find such evidence, even though they had not obtained a warrant. *People v. Cook*, 13 Cal. 3d 663, 669, 532 P.2d 148, 151, 119 Cal. Rptr. 500, 503 (1975).

68. See *People v. Jochen*, 46 Cal. App. 3d 243, 119 Cal. Rptr. 914 (1975); *People v. Superior Court (Courie)*, 44 Cal. App. 3d 207, 118 Cal. Rptr. 586 (1974); *People v. Gregg*, 43 Cal. App. 3d 137, 117 Cal. Rptr. 496 (1974).

69. 16 Cal. 3d 557, 547 P.2d 417, 128 Cal. Rptr. 641 (1976).

70. Although the opinion did not cite to *Edwards*, to the *Dumas* passage that established the hierarchy of Fourth Amendment protections, or to the *Katz* passage in which the United States Supreme Court shifted its focus to reasonable expectation, the *Katz* rationale was nevertheless evident. *Id.* at 567-69, 547 P.2d at 423-25, 128 Cal. Rptr. at 647-49.

71. The use of a flashlight to illuminate the interior of the vehicle was of "no constitutional significance." *Id.* at 563 n.2, 547 P.2d at 421 n.2, 128 Cal. Rptr. at 645 n.2 (relying on *People v. Hill*, 12 Cal. 3d 731, 748, 528 P.2d 1, 14, 117 Cal. Rptr. 393, 406 (1974); *People v. Superior Court (Mata)*, 3 Cal. App. 3d 636, 84 Cal. Rptr. 81 (1970)).

72. 16 Cal. 3d at 564-65, 547 P.2d at 421-22, 128 Cal. Rptr. at 645-46.

73. *Id.* at 567-68, 547 P.2d at 423-24, 128 Cal. Rptr. at 647-48.

74. *Id.* at 568, 547 P.2d at 424, 128 Cal. Rptr. at 648.

being transported in the trunk.⁷⁵ The occupants of the car in this case, however, appeared to be only casual marijuana users, not dealers or transporters. Their right of privacy over the contents of concealed areas of their car outweighed the officers' right to search.⁷⁶

Conclusion

People v. Triggs,⁷⁷ perhaps the most significant contribution to the development of the law of privacy since *United States v. Katz*,⁷⁸ imposed a duty upon the courts to consider more than the manner in which the individual conducted himself in public. That manner alone might not open the door to a more intrusive, unexpected police surveillance. *Triggs* thus requires reexamination of many tenets of search and seizure law. An occupant of a house might, for example, expect that a passerby would glance through a window or over a fence to see the interior of his home or yard; a similar observation by a police officer would be legal.⁷⁹ If the officer remained outside the window or fence and peered through small openings for extended periods of time in quest of evidence of criminal activity, however, his covert and intense observations would not, under the *Triggs* rationale, be the equivalent of a passerby's brief observations.⁸⁰ Rather, such activity would constitute a search in violation of the occupant's privacy of both place and person.

Other methods of police observation that are now condoned by the courts must also be reexamined in light of *Triggs*. An apartment occupant who might expect that a passerby or neighbor would hear his loud conversation should not be subjected to prolonged police eavesdropping on his

75. *Id.* at 572-73, 547 P.2d at 427-28, 128 Cal. Rptr. at 651-52. The quantity of marijuana alone was not determinative. Additional circumstances, such as an attempt to avoid apprehension or the strong odor of fresh marijuana smoke, may have generated a reasonable suspicion sufficient to establish probable cause. *Id.* at 573, 547 P.2d at 428, 128 Cal. Rptr. at 652.

76. Justice Clark, joined by Justice McComb, dissented in *Wimberly*. The dissenters disagreed with the majority's conclusion that a casual user was not likely to keep more drugs in the trunk. The dissenters did agree with the majority, however, that a greater expectation of privacy attached to the trunk than to the passenger compartment. *Id.* at 576-77, 547 P.2d at 430, 128 Cal. Rptr. at 654 (Clark, J., dissenting).

77. 8 Cal. 3d 884, 506 P.2d 232, 106 Cal. Rptr. 408 (1973).

78. 389 U.S. 347 (1967).

79. See *People v. Superior Court (Irwin)*, 33 Cal. App. 3d 475, 109 Cal. Rptr. 106 (1973) (peeking through cracks in a garage door from the driveway held permissible); cf. *Lorenzana v. Superior Court*, 9 Cal. 3d 626, 632, 511 P.2d 33, 35, 108 Cal. Rptr. 585, 587 (1973) (a sidewalk or similar passageway implies permission to enter and necessarily negates any reasonable expectation of privacy as to observations made there). But see *People v. Fly*, 34 Cal. App. 3d 665, 110 Cal. Rptr. 158 (1973) (use of telescope to look into yard through fence covered by nearly impenetrable foliage held improper). See note 43 *supra*.

80. Cf. *People v. Berutko*, 71 Cal. 2d 84, 453 P.2d 721, 77 Cal. Rptr. 217 (1969) (by inference); *People v. Superior Court (Reilly)*, 53 Cal. App. 3d 40, 45, 125 Cal. Rptr. 504, 508 (1975) (by inference).

whispered conversations.⁸¹ Aerial flights over rural property in search of crime would be justified only if flown in a manner expected of private pilots unconcerned with such evidence.⁸² The use of binoculars by the police to spy on people and homes for extended periods of time⁸³ and the installation of television cameras to monitor street activity in areas of excessive criminal activity are similarly not equivalent to the passerby's brief observations.⁸⁴ Police observation of the darkened interior of an automobile at night could also be unreasonable if the owner displayed a high expectation of privacy by conducting his activities in the dark⁸⁵ and the police lacked probable cause for a search.⁸⁶

Personal privacy cannot be sheltered from unreasonable governmental intrusion by courtroom rhetoric. Justice Wright's opinions on search and seizure and the right of privacy emphasized that it is the duty of the judiciary to pay the utmost respect to privacy of the person. These opinions exemplify not only the practicality of the Chief Justice's views but also his concern for the preservation of this precious right. The task before the California courts will be to stabilize and clarify the concept of privacy set forth in *Triggs*. People will then know the times and places at which they can expect personal privacy free from governmental intrusion; the police will similarly be able to combat crime while protecting the right of privacy.

81. See *People v. Guerra*, 21 Cal. App. 3d 534, 538, 98 Cal. Rptr. 627, 629 (1971); *Perspectives*, *supra* note 1, at 404-05.

82. The method of observation in the most public of places may be so offensive as to tip the balance in favor of the right of individual privacy. See, e.g., *People v. Sneed*, 32 Cal. App. 3d 535, 108 Cal. Rptr. 146 (1973). See also *Air Pollution Variance Bd. v. Western Alfalfa Corp.*, 416 U.S. 861 (1974). *Sneed* was one of the few California cases to fully embrace the *Triggs* rationale. 32 Cal. App. 3d at 541-43, 108 Cal. Rptr. at 149-51.

83. See, e.g., *People v. Henze*, 253 Cal. App. 2d 986, 61 Cal. Rptr. 545 (1967); cf. *United States v. Kim*, 415 F. Supp. 1252 (D. Hawaii 1976) (telescope).

84. One commentator recognizes that the individual's expectation of privacy is less on a public street or in a park than in a car or home, but suggests that "privacy has temporal and circumstantial as well as geographic dimensions." *Generalities*, *supra* note 1, at 82-83.

85. Unable to find a private place in a crowded society, people may seek a semblance of quiet in their cars. See *Perspectives*, *supra* note 1, at 401-09. Although such persons probably expect that others are more likely to see their activities in their car than in their home, a *Triggs* analysis could limit the methods available to the police and the places they could look to discover evidence of crime. See *Generalities*, *supra* note 1, at 75-76. But see *Cardwell v. Lewis*, 417 U.S. 583 (1974). A *Triggs* analysis must, however, recognize the problems faced by the police while investigating criminal activity.

86. *People v. Wheeler*, 28 Cal. App. 3d 1065, 1069, 105 Cal. Rptr. 56, 58 (1972); *People v. Superior Court (Mata)*, 3 Cal. App. 3d 636, 84 Cal. Rptr. 81 (1970).

